Nos. 05-11682-DD and 05-12601-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the Eleventh Circuit Rule 28.1-1(b), the Federal Communications Commission hereby certifies that the persons and entities known to have an interest in the outcome of this case are Joshua E. Swift, Assistant General Counsel, Verizon, and the persons and entities listed in the Certificate of Interested Persons and Corporate Disclosure Statement of the "Motion of the Federal Communications Commission to Dismiss."

STATEMENT OF ORAL ARGUMENT

Respondents support petitioners' request for oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

The Court has jurisdiction upon a petition for review timely filed by a "party" to the proceedings below. 28 U.S.C. § 2344. Vermont PSB was not a party to the administrative proceedings below and thus has not invoked the Court's jurisdiction. See Section I.

STATEMENT OF ISSUES PRESENTED

In the Order before the Court,[1] the Federal Communications Commission ("FCC") interpreted the preemption of state authority to regulate rates of wireless telephone services set forth in section 332(c)(3)(A) of the Communications Act to include state regulations requiring or prohibiting the use of line items in wireless telephone bills. The issues before the Court are as follows:

1. Whether the Vermont Public Service Board ("Vermont PSB") was a "party" to the proceedings below and thus is qualified to invoke the Court's jurisdiction under the Hobbs Act to challenge the Order, where Vermont PSB neither participated in the declaratory ruling proceedings prior to the close of the administrative record nor filed a petition for agency reconsideration?

2. Whether the FCC reasonably construed section 332(c)(3)(A)'s prohibition on state wireless rate regulation to preempt states from requiring or prohibiting line items on the bills of wireless telephone carriers?

3. Whether section 405 of the Communications Act bars the Court from considering whether the FCC violated the notice and comment requirements of the Administrative Procedure Act ("APA"); and if the issue is before the Court, whether the FCC was required to provide parties with notice and the opportunity for comment before interpreting section 332(c)(3)(A)?

4. Whether the petitioners' challenge to the FCC's tentative observation that certain state regulations may be subject to preemption because they conflict with federal law is reviewable?

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[1] In the Matter of Truth-In-Billing Format, 20 FCC Rcd 6448 (2005) ("Order").

5. Whether the FCC's construction of section 332(a)(3)(A) violates the savings clauses in the Communications Act and the Telecommunications Act of 1996 or interferes with state taxing authority?

COUNTERSTATEMENT OF THE CASE

A. History Of Wireless Telephone Regulation

The Communications Act of 1934, 47 U.S.C. §§ 151, et seq., provides a federal framework for the regulation of wireless telephone services. Title III of the Act gives the FCC exclusive authority to license the radio frequencies used in wireless communications. See 47 U.S.C. §§ 301, 303. In the exercise of this authority, the FCC has set aside and licensed radio frequencies for wireless telephone service since the mid-1970s.[2] In response to the growing demand for wireless services and in an effort to encourage competition in wireless markets, the FCC in later years has increased substantially the spectrum allotted to wireless telephone services.[3]

Until 1993, wireless communications common carrier services -- including cellular telephone service -- were subject to the same system of dual state and federal regulation that governs traditional wireline telephone services.[4] Section 2(b) of the Act reserved to the states the authority to regulate intrastate common

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[2] See generally Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842, 845 (2nd Cir. 1996) ("Connecticut DPUC").

[3] E.g., Amendment of the Commission's Rules, 8 FCC Rcd 7770 (1993).

[4] See 47 U.S.C. § 152. See generally Louisiana Public Service Commission v. FCC, 476 U.S. 355, 360 (1986).

carrier services, and a number of states required carriers to establish intrastate rates in tariffs filed with their public utility commissions.[5] State regulation of intrastate wireless services included the oversight of the rate structures for those services.[6] Interstate rates were regulated under Title II of the Communications Act. Title II imposes a number of specific obligations on common carriers, including the filing of tariffs with the FCC to establish the rates, terms, and conditions of interstate service. 47 U.S.C. § 203.

As competition in wireless services increased, Congress in the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392, amended the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry."[7] The OBRA amendments created new regulatory categories of wireless service including

[5] 47 U.S.C. § 152(b). See, e.g., Petition on Behalf of the State of Hawaii, 10 FCC Rcd 7872, 7879-80 (¶¶ 30-38) (1995) ("Hawaii") (state tariffing of wireless services); Petition on Behalf of the State of Connecticut, 10 FCC Rcd 7025, 7046 (¶ 43) (1995) ("Connecticut"), aff'd, Connecticut DPUC, 78 F.3d at 845.

[6] E.g., Connecticut DPUC, 78 F.3d at 847 (state commission reviews whether wireless carriers' "rate structures were unreasonable or discriminatory"); Nationwide Cellular Service, Inc. v. Public Service Commission of the State of New York, 180 A.D.2d 24, 26, 593 N.Y.S.2d 852, 853 (1992) (state commission regulates the "rate structures" of intrastate cellular telephone service).

[7] Cellnet Communications, Inc. v. FCC, 149 F.3d 429, 433 (6th Cir 1998).

commercial mobile radio service ("CMRS"),[8] and changed the framework of wireless services regulation in two significant respects in order to accelerate the development of wireless competition.[9]

First, Congress eliminated the dual federal and state framework for rate and entry regulation, establishing instead a uniform "national regulatory policy for CMRS, not a policy that is balkanized state-by-state." Connecticut, 10 FCC Rcd at 7034 (¶ 14). Section 332(c)(3)(A) denies the states "any authority" to "regulate the entry of or the rates charged by" any CMRS provider. 47 U.S.C. § 332(c)(3)(A). That same section permits a state to petition the FCC for authority to regulate CMRS rates, which the agency shall grant if the state demonstrates that "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. § 332(c)(3)(A). See also 47 C.F.R. § 20.13 (regulations governing state petitions for authority to regulate CMRS rates). In the absence of FCC authorization, section 332(c)(3)(A) permits states to regulate only terms and conditions of CMRS services "other" than rates and entry. 47 U.S.C. § 332(c)(3)(A). Consistent with section 332(c)(3)(A), Congress also amended section 2(b) of the Act to exclude

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[8] CMRS includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). The statute uses the phrase "commercial mobile service." The FCC's rules substitute the equivalent term CMRS, which for purposes of consistency will be used throughout this brief.

[9] See Hawaii, 10 FCC Rcd at 7874 (¶ 8).

intrastate CMRS rates and entry from the communications services that are reserved to state jurisdiction. 47 U.S.C. § 152(b).

Second, OBRA amended the Act to reflect Congress's "general preference in favor of reliance on market forces rather than regulation,"[10] and to permit the emerging CMRS market to develop subject to only that degree of regulation "for which the Commission and the states [can] demonstrate a clear-cut need."[11] Although section 332(c)(1)(A) specifies that CMRS providers are to be treated as common carriers subject to Title II, the statute authorizes the FCC by regulation to forbear from applying Title II regulation to CMRS carriers if certain criteria are satisfied. 47 U.S.C. § 332(c)(1)(A). This reform of the federal regulatory regime went hand-in-hand with section 332(c)(3)(A), which denies the states jurisdiction over CMRS rates and entry and reflects Congress's recognition that "[s]tate regulation can be a barrier to the development of competition."[12]

Consistent with the deregulatory mandate of OBRA, the FCC has exercised its section 332(c)(1)(A) forbearance authority to bar CMRS carriers from filing interstate tariffs that otherwise would be required under section 203.[13] The FCC determined that eliminating tariff regulation of CMRS rates "will foster

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[10] Petition of New York State Public Service Commission To Extend Rate Regulation, 10 FCC Rcd 8187, 8190 (¶ 18) (1995).

[11] Hawaii, 10 FCC Rcd at 7874 (¶ 20).

[12] Connecticut, 10 FCC Rcd at 7034 n.44, citing H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., 480-81 (1993).

[13] 47 C.F.R. § 20.15(c). See Wireless Consumers Alliance, Inc., 15 FCC Rcd 17021, 17031 (¶ 18) (2000), recon. denied, 16 FCC Rcd 5618 (2001) ("WCA").

competition which will expand the consumer benefits of a competitive marketplace."[14] In particular, the FCC found that detariffing "enable[s] CMRS providers to respond quickly to competitors' price changes" and motivates carriers to win customers "by offering the best, most economic service packages."[15] In order to "ensur[e] that unwarranted regulatory burdens are not imposed upon any [CMRS provider],"[16] the FCC likewise has denied state requests for permission to regulate CMRS rates and entry because the states have failed to show that market forces are inadequate to protect customers.[17]

As a result of federal statutory and regulatory policies, the rates CMRS providers charge their customers generally are governed "by the mechanisms of a competitive marketplace,"[18] in which prospective rates and terms of service are established in service contracts rather than dictated by federal or state regulators. In this largely deregulated rate regime, the FCC generally "rel[ies] on the competitive marketplace to ensure that CMRS carriers do not charge rates that are unjust or unreasonable, or engage in unjust or unreasonable discrimination."[19]

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[14] Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411, 1480 (¶ 177) (1994) ("Second Report").

[15] Id. at 1479 (¶ 177).

[16] Connecticut DPUC, 78 F.3d at 845, quoting Second Report, 9 FCC Rcd at 1418 (¶ 15).

[17] See, e.g., Hawaii, 10 FCC Rcd 7872. The FCC has thus far not granted any state petitions to regulate CMRS rates.

[18] WCA, 15 FCC Rcd at 17032-33 (¶¶ 20-21).

[19] Id. at 17033 (¶ 21).

The pro-competitive, deregulatory framework for CMRS rates prescribed by Congress and implemented by the Commission has enabled CMRS competition to flourish, with substantial benefits to consumers. Subscribership continues to increase rapidly. During 2004, for example, the number of subscribers to mobile telephone service increased from 160.6 million to 184.7 million, producing a nationwide penetration rate of roughly 62 percent of the population.[20] In the last three years, the total number of subscribers to mobile telephone service has increased by 30 percent.[21] Intense price competition has resulted in affordable rates as well as innovative pricing plans, such as a proliferation of "family plan" offerings and a variety of new prepaid plans.[22] Consumers continue to increase the use of their wireless phones. The average minutes-of-use ("MOUs") per subscriber per month in 2004 was 680 minutes, an increase of 80 MOUs from the previous year.[23]

In recent years, CMRS customers have also been able to choose among multiple providers as well as a wide array of service and equipment options.[24] For

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[20] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, FCC 05-173 (released Sept. 30, 2004), 2005 WL 2429714 (F.C.C), at ¶¶ 5, 161 ("Tenth Report").

[21] Id. at ¶ 161.

[22] Id. at ¶ 3. Mobile voice calls are far less expensive on a per minute basis in the United States than in Western Europe, and at least some indicators show that the per minute rates for this service are decreasing. Id. at ¶¶ 5, 157.

[23] Id. at ¶ 168.

[24] Id. at ¶ 97.

example, approximately 277 million people, or 97 percent of the total United States population, live in counties with access to three or more different carriers offering mobile telephone service.[25]

CMRS carriers typically operate across state borders and, in contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. A number of nationwide CMRS operators have national networks and offer national rate pricing plans.[26] Other CMRS carriers offer pricing plans on a multi-state, regional basis.[27]

B. The Truth-In-Billing Order

Recognizing that competitive markets can function properly only if consumers have access to clear and accurate information on the service choices that are available to them, the FCC in 1999 adopted principles and guidelines designed to ensure that consumers obtain thorough, accurate, and understandable telephone bills.[28] These truth-in-billing guidelines require that consumer telephone bills:

-- "be clearly organized, clearly identify the service provider, and highlight any new providers;"

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[25] Id. at ¶ 41.

[26] Id. at ¶ 97.

[27] Id. at ¶ 25.

[28] Truth-In-Billing and Billing Format, 14 FCC Rcd 7492 (1999), recon. granted in part, 15 FCC Rcd 16544 (2000) ("Truth-In-Billing").

-- "contain full and non-misleading descriptions of charges that appear therein;" and

-- "contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest charges, on the bill."[29]

The FCC recognized that, because there are different ways in which telecommunications carriers can convey clear and accurate billing information, carriers should have flexibility in implementing these guidelines, 14 FCC Rcd at 7499-7500 (¶¶ 10-11), including by using the billing format that "best fit[s] their own specific needs and those of their customers." Id. at 7499, 7501 (¶¶ 5, 19). The FCC rejected the suggestion that it require carriers to combine all regulatory fees into a single charge or to forbid them from separating out any fees resulting from regulatory action. Id. at 7527 (¶ 55). The FCC stated that "it is the carriers' business decision whether, how, and how much of [their] costs they choose to recover directly from consumers through separately identifiable charges." Id. at 7528 (¶ 56).[30]

[29] 14 FCC Rcd at 7496 (¶ 5).

[30] See also id. at 7527 (¶ 55) (carriers should have "the freedom to respond to consumer and market forces individually, and consider whether to include these charges as part of their rates or to list the charges in separate line items.").

Although the FCC construed section 201(b) to require that the billing practices of both wireline and CMRS carriers be fair, clear, and truthful,[31] it exempted CMRS carriers from certain specific truth-in-billing rules because it was not then convinced that all those rules were necessary in the CMRS context. Id. at 7501-03 (¶¶ 13-19).[32] The FCC invited further comment as to whether it should apply those rules to CMRS carriers. Id. at 7535 (¶ 68).

The FCC left the states free to enact truth-in billing regulations that were consistent with the federal guidelines, including rules that were more specific than the federal rules. Id. at 7508 (¶ 26). The FCC stated that it would work with the states "to promote competition and to combat telecommunications-related fraud." Id.

[31] Section 201(b) requires that all carriers' charges, practices, classifications, and regulations "for and in connection with" interstate communications service be just and reasonable. 47 U.S.C. § 201(b). The FCC found that "a carrier's provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of section 201(b) of the Act." Truth-In-Billing, 14 FCC Rcd at 7506 (¶ 24).

[32] The FCC specified that CMRS providers, like wireline carriers, at a minimum must (1) clearly identify the name of the service provider associated with each charge on the bill, and (2) prominently display on each bill a toll-free telephone number that customers may call to inquire or dispute any charge. Id. at 7502 (¶ 17).

C. The NASUCA Petition

On March 30, 2004, petitioner National Association of State Utility Consumer Advocates ("NASUCA") filed with the FCC a petition for declaratory ruling asking the agency to clarify that telecommunications carriers are prohibited from imposing line-item charges, surcharges, or other fees on customers' bills unless those charges are expressly mandated or authorized by a federal, state, or local regulatory authority.[33] In its Petition, NASUCA asserted that such line items are "inherently misleading"[34] and violate the truth-in billing guidelines, as well as section 201 and section 202 of the Communications Act. NASUCA Petition at 24-42. NASUCA also asked the FCC to restrict the amount of any government mandated line item "to the amount expressly authorized by federal, state, or local governmental authority." Id. at 69.

On May 25, 2004, the FCC invited parties to comment on NASUCA's petition.[35] The FCC received comments and reply comments from more than 40 entities and thousands of individuals. Some opponents of the NASUCA petition argued, *inter alia*, that a grant of NASUCA's request would involve states in the

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[33] National Association of Utility Consumer Advocates Petition for Declaratory Ruling (Mar. 30, 2004) ("NASUCA Petition").

[34] NASUCA Petition at 37.

[35] National Association of State Utility Consumer Advocates (NASUCA) Petition for Declaratory Ruling, 19 FCC Rcd 9451 (2004).

rate regulation of CMRS service in violation of section 332(c)(3)(A) because it would permit states to mandate the inclusion of specific line items.[36] Other parties, including NASUCA and intervenor National Association of Regulatory Utility Commissioners ("NARUC"), contended that section 332(c) did not preempt state regulation of line items.[37]

D. The Order On Review

On March 18, 2005, the FCC released an order in the truth-in-billing rulemaking and in the proceeding addressing the NASUCA petition for declaratory ruling. This Order consists of three parts: (1) a Second Report and Order in the truth-in-billing rulemaking, (2) a Declaratory Ruling in response to the NASUCA petition, and (3) a Second Further Notice of Proposed Rulemaking in the truth-in-billing proceeding.

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[36] E.g., Comments of Nextel Communications, Inc and Nextel Partners (July 14, 2004) at 26-28; Reply Comments of T-Mobile USA, Inc. (Aug. 13, 2004) at 12-13; Reply Comments of Verizon Wireless (Aug. 13, 2004) at 8-10.

[37] Reply Comments of NASUCA (Aug. 13, 2004) at 56-58; Letter from James Bradford Ramsay, NARUC, to Marlene Dortch, Secretary, FCC (March 3, 2005) ("NARUC Mar. 3, 2005 Letter").

In the Second Report and Order, the FCC formally revised its truth-in-billing rules to extend explicitly to CMRS carriers the generally applicable requirement that telephone bills be brief, clear, non-misleading, and in plain language.[38] In the Declaratory Ruling, the FCC denied NASUCA's petition, clarified that non-misleading line items are permissible under its truth-in-billing rules, and held that state regulation prohibiting or requiring line items in CMRS bills is rate regulation that is preempted by federal law.[39] And in the Second Further Notice of Proposed Rulemaking, the FCC initiated a further rulemaking to additional federal truth-in-billing issues and the role of states in regulating billing for CMRS services.

In denying NASUCA's petition, the FCC reaffirmed that section 201(b) proscribes misleading or deceptive billing information, including misleading or deceptive information embedded in line charges. 20 FCC Rcd at 6460-61 (¶¶ 24-26). The FCC "reiterate[d] that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carrier's business decision as to whether and how much of such costs they choose to recover directly from consumers through a separate line item charge." Id. at 6461 (¶ 27). The FCC also construed its rules to forbid carriers from including administrative and similar costs as part of a specific regulatory fee line item, explaining that "a regulatory line

[38] Order, 20 FCC Rcd at 6456-58 (¶¶ 16-20).

[39] Id. at 6458-59 (¶ 23), 6462-65 (¶¶ 30-32).

item charge should never exceed any maximum amount or cap established by the government to recover for that specific program." Id. at 6462 (¶ 28).

In determining that state requirements or prohibitions on the use of line items for CMRS are a form of state rate regulation proscribed by section 332(c)(3)(A), the FCC construed the statutory bar on state rate regulation to "prohibit states from prescribing, setting or fixing [the] rates" of CMRS providers. Id. The FCC noted that agency precedent establishes that section 332(c)(3)(A) not only bars "'how much may be charged' for CMRS" but also prohibits state regulation of rate structures and "'rate elements for CMRS.'" Id. at 6463 (¶ 30), quoting Southwestern Bell Mobile Systems Inc., 14 FCC Rcd 19898, 19906 (¶ 20) (1999). And the FCC pointed out that its case law equates "line items" with "rate elements."[40]

The FCC explained that state regulations prohibiting or requiring a CMRS carrier to recover specific costs through a separate line item clearly and directly affect the rates and rate structures for CMRS. 20 FCC Rcd at 6463 (¶ 31). For example, the Commission pointed out that a state prohibition on discrete line items regulates the structure of a CMRS carrier's rates by permitting recovery of cost elements only through "an undifferentiated charge for service." Id. Conversely, a

[40] 20 FCC Rcd at 6463 (¶ 30), citing Federal-State Board on Universal Service, 17 FCC Rcd 24952, 24979 (¶ 53) n.133 (2002).

state requirement that CMRS carriers "segregate particular costs into line items . . . similarly would limit a carrier's ability to set and structure its rates" by compelling the disaggregation of rate elements. Id. The impact on rates of state line item regulation is particularly clear, the Commission explained, "considering that most CMRS carriers . . . market and price their services on a national basis." Id. Absent preemption, "[a] CMRS carrier forced to adhere to a varying patchwork of state line item requirements . . . would be forced to adjust its rate structure from jurisdiction to jurisdiction." Id.

The FCC also observed that state regulations prohibiting or mandating line items "may be subject to preemption because they conflict with established federal policy." Id. at 6466 (¶ 35) (emphasis added). The FCC explained that state line item regulation would be inconsistent with the "uniform, national, and deregulatory framework for CMRS" established by Congress and the FCC, in which "prospective rates are established by the CMRS carrier and customer in service contracts, rather than dictated by federal or state regulators." Id. at 6464 (¶ 35). The FCC also stated that there was a "significant possibility" that state regulation would lead to a varying patchwork of state line item requirements and prohibitions, which would "undermine the benefits derived from allowing CMRS

carriers the flexibility to design national or regional rate plans." Id. at 6464, 6467 (¶¶ 31, 35).[41]

The FCC emphasized that its ruling with regard to the preemption of state line item regulation would not affect the ability of states to levy and collect taxes and regulatory fees, including contributions to state universal service support mechanisms, on either CMRS providers or their end-user customers. Id. at 6464-65 (¶ 32). In addition, the FCC made clear that its ruling did not preclude states from regulating billing matters other than line items, including the adoption of "state truth-in-billing requirements that are consistent with federal truth-in billing rules." Id. at 6466 (¶ 33). And the FCC emphasized that its ruling did not prevent state regulation concerning the disclosure of rates set by CMRS providers, or the application of generally applicable state contractual or consumer fraud laws to CMRS providers. Id.

The FCC reserved to its further rulemaking "the broader issue of the role of states in regulating billing," id. at 6467 (¶ 37), including "the proper boundaries" of the states' role in regulating the "other terms and conditions" of wireless service under section 332(c)(3)(A). Id. at 6475 (¶ 52). The FCC specifically invited comment on whether it should preempt state regulation of CMRS billing practices

[41] As noted below, the FCC invited parties in the further rulemaking initiated in the Order to address the issue of "conflict preemption." 20 FCC Rcd at 6474 (¶ 50).

that are inconsistent with federal policy and the applicability of such "conflict preemption" under the Communications Act. Id. at 6474 (¶ 50).

No party sought for reconsideration of the Order. The Commission has received comments and reply comments on the broader preemption issues in the further rulemaking, but has not yet issued a ruling on those matters.

E. Appellate Proceedings

NASUCA and the Vermont PSB petitioned this Court to review the Order. The FCC filed a motion to dismiss (1) Vermont PSB's petition for review on the grounds that the Vermont PSB was not a party to the administrative proceedings below and thus Vermont could not invoke the Court's jurisdiction to review the Order, and (2) NASUCA's petition on the ground that NASUCA lacked standing. On the basis of representations by NASUCA in response to the motion to dismiss, the FCC withdrew that motion as to NASUCA but continued to press it as to Vermont PSB. Several CMRS intervenors filed a motion to dismiss NASUCA's petition for review for lack of standing. The Court in an order issued December 13, 2005, directed that these pending motions be "carried with the case." Order (Dec. 13, 2005) at 2-3.

STANDARD OF REVIEW

In order to prevail on review, the petitioners must establish that the Order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "exceedingly deferential"[42] standard of review, the court "must defer to the wisdom of the agency provided [its] decision is reasoned and rational."[43] The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. E.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375 (1989).

The Court must review the Commission's construction of the Communications Act -- including its construction of section 332 -- in accordance with the standard articulated in Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843 n.9, 842. If so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. If "the statute is silent or ambiguous with

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[42] Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996).

[43] Zukas v. Hinson, 124 F.3d 1407, 1409 (11th Cir. 1997), quoting McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982). See Kelliher v. Veneman, 313 F.3d 1270, 1276 (11th Cir. 2002).

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron, 467 U.S. at 843. Accord National Cable & Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688, 2698 (2005); Georgia Power Co. v. Teleport Communications Atlanta, Inc., 346 F.3d 1033, 1044 (11th Cir. 2003).

Both the Seventh Circuit[44] and the Tenth Circuit[45] have held that the FCC's construction of section 332(c)(3)(A) is entitled to deference under Chevron -- and with good reason. Congress in section 332(c)(3)(A) "never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless service." Cellular Telecommunications Industry Association v. FCC, 168 F.3d 1332, 1336 (D.C. Cir. 1999) ("CTIA"). By leaving the "key terms undefined," id., and not otherwise specifying what it meant by rate regulation, Congress implicitly delegated authority to the FCC to elucidate the statutory meaning. Chevron, 467 U.S. at 843. See Teper v. Miller, 82 F.3d 989, 997 (11th Cir. 1996) ("An agency . . . to which Congress has delegated broad discretion in interpreting and administering a complex federal regulatory regime, is entitled to significant

[44] Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1073 (7th Cir. 2004) (FCC orders interpreting section 332(c)(3)(A) "are entitled to deference").

[45] Sprint Spectrum, L.P. v. State Corporation Commission of the State of Kansas, 149 F.3d 1058, 1061 (10th Cir. 1998).

latitude when acting within its statutory authority, even in its decisions as to the scope of preemption of state law.").

Vermont PSB argues that the Supreme Court in Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735, 744 (1996), held that an agency's interpretation of a statute's preemptive effect was "undeserving of deference." Vermont PSB Brief at 38. Vermont PSB has it backwards. Smiley demonstrates that Chevron deference is due the FCC's interpretation of the phrase "to regulate . . . rates" even though the substantive meaning of that term affects the scope of preemption. The Supreme Court in Smiley distinguished between "the question of the substantive (as opposed to pre-emptive) meaning of a statute" and "the question of whether a statute is pre-emptive." 517 U.S. at 744. The Supreme Court did not have to decide whether the agency deserves deference on the second question because there was "no doubt" that the statute in that case preempted state law. Id. On the first question, however, the Court deferred to the agency's reasonable interpretation of the substantive meaning of the term "interest," to include late fees, and thus concluded that the state's regulation of late fees was preempted. Id. at 744-45. In this case, section 332(c)(3)(A) unquestionably preempts state law. The issue is one of the statute's substantive meaning: whether "regulat[ing] . . . the rates" of CMRS providers includes state regulations requiring or prohibiting line items. On that

question, in accordance with Smiley, Chevron deference is due. See id. at 743-45.[46]

Moreover, withholding Chevron deference from the FCC's interpretation in this case because it involves preemption would produce anomalous results. The first sentence of section 332(c)(3)(A) -- a preemption provision -- denies the states authority "to regulate . . . the rates" of CMRS providers. The third sentence of section 332(c)(3)(A) -- which is not a preemption provision -- states that, "notwithstanding the first sentence," a state may petition the FCC for authority "to regulate the rates" of CMRS providers. The FCC is clearly entitled to Chevron deference in interpreting the phrase "to regulate the rates" in the third sentence of section 332(c)(3)(A), and it would be anomalous for the FCC to be denied deference in interpreting the identical phrase in the first sentence of the same statute.

[46] Vermont PSB also contends that this Court's decision in Bankwest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005), establishes that the FCC should be denied Chevron deference because section 332(c)(3)(A) is a preemption statute. But the decision in Bankwest is no longer the law of this Circuit. By order dated December 28, 2005, this Court vacated the decision in Bankwest and set the case for rehearing en banc. Bankwest, Inc. v. Baker, 2005 WL 3534218 (11th Cir. Dec. 28, 2005).

SUMMARY OF ARGUMENT

I. As shown by the FCC's motion to dismiss, the Court lacks jurisdiction to entertain Vermont PSB's petition for review. Under the Hobbs Act, the Court has jurisdiction to review the Order upon a petition for review timely-filed by a party to the agency's proceedings. The FCC's records show that Vermont PSB did not participate in the proceedings below. In such instances, section 405 of the Communications Act requires the filing of a petition for reconsideration as a "condition precedent" for judicial review. Vermont PSB did not file a petition for reconsideration, and thus this Court lacks jurisdiction to entertain Vermont PSB's petition for review.

II. On the merits, the FCC reasonably construed the preemption of state rate regulation set forth in section 332(c)(3)(A) to prevent states from requiring or forbidding line items on CMRS bills. When section 332(c)(3)(A) was adopted, rate regulation was generally understood to include, *inter alia*, the regulation of rate structures and rate elements. A line item in a CMRS bill is an element of the CMRS rate, and requiring or prohibiting that element directly affects the manner in which the carrier sets rates for CMRS service.

III. The petitioners' claims that the FCC violated the notice and comment requirements of the APA are equally flawed. As an initial matter, section 405 bars those claims because the petitioners did not first present them to the agency. In

any event, no notice and comment was required here. The preemption ruling was an exercise of the FCC's adjudicatory authority for which the notice and comment rulemaking procedures are not required. Even if the preemption ruling were construed as a rule, the ruling would be at most an interpretative rule exempt from the notice and comment requirements that govern legislative rules.

IV. The petitioners' challenge to the FCC's tentative observation that state regulations requiring or prohibiting line items may be subject to preemption because they conflict with federal policy is unavailing. The Court lacks jurisdiction to consider the matter because the petitioners failed to raise it below, and because the Commission's observation is not a decision. In any event, the observation was entirely reasonable.

V. The petitioners' claims that the Order conflicts with the statutory savings clauses also fail. They are not reviewable because they were not first raised before the agency, and in any event, those statutes do not preserve state regulations that conflict with section 332(c)(3)(A).

IV. Finally, the preemption ruling does not interfere with the taxing authority of the states. It does not prevent the states from assessing any tax or from obligating CMRS carriers or their customers to pay any tax. The ruling concerns line items on bills, not tax assessment or collection.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION TO CONSIDER VERMONT PSB'S PETITION FOR REVIEW.

As the FCC pointed out in its motion to dismiss,[47] the Court would have jurisdiction to review the Order under the Hobbs Act pursuant to a petition for review timely-filed by a "party" to the proceedings below. 28 U.S.C. § 2344. See Alabama Power Co. v. FCC, 311 F.3d 1357, 1366 (11th Cir. 2002), cert. denied, 540 U.S. 937 (2003). According to the FCC's records, Vermont PSB did not participate in the proceedings leading to the Declaratory Ruling prior to the close of the administrative record on March 3, 2005.[48] Although Vermont PSB -- on March 4, 2005, at 3:45 p.m. -- attempted to submit in the record an *ex parte* letter bearing a March 3 date[49] that was addressed to the individual commissioners, the FCC's Secretary rejected that letter as untimely filed.[50]

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[47] Motion to Dismiss filed by FCC (Sept. 30, 2005). The FCC's motion to dismiss is pending before the Court.

[48] FCC Motion at 6.

[49] Vermont PSB alleges that it had transmitted its *ex parte* letter electronically to individual commissioners the day before it attempted to file that letter with the FCC's Secretary. The FCC has no records to substantiate Vermont PSB's allegation. Even assuming that Vermont PSB had made those transmissions, the FCC's rules specify that "[w]ritten submissions made only to the Chairman or individual Commissioners [do] not confer party status." 47 C.F.R. § 1.1202(d) note 2. Party status, in other words, arises only from participation in the agency proceedings on the record -- not from communications with individual commissioners.

[50] Vermont PSB did not petition the FCC to review the Secretary's procedural ruling or otherwise challenge the agency's rejection of its letter for filing.

Vermont PSB also was not a party to the rulemaking that led to revisions of the truth-in-billing rules in the Order that is before the Court. The FCC initiated that proceeding in 1999 with a notice of proposed rulemaking inviting comments on possible amendments to its truth-in-billing rules, including the extension of those rules to CMRS carriers; it concluded that rulemaking in the Order on review. The FCC's records reflect that Vermont PSB made no filings or otherwise participated in any way in that rulemaking.[51]

Vermont PSB thus failed to become a "party" by participating in any of the administrative proceedings that led to the Order. As a non-party, Vermont PSB cannot invoke the Court's jurisdiction under the Hobbs Act to review the Order.

Reinforcing the Hobbs Act limitation of review to "parties" to the administrative proceeding, section 405(a) of the Communications Act requires a person that was not "a party to the proceedings resulting in [an FCC] order" to file a petition for agency reconsideration as a "condition precedent" to judicial review of that order. 47 U.S.C. § 405(a). Section 405(a) in effect permits one who has not participated in the proceedings leading to an FCC order -- as Vermont PSB had not in this case -- to become a party by filing a petition for agency reconsideration.

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[51] Vermont PSB had filed comments in the earlier rulemaking that led to the adoption of the initial truth-in-billing rules. The FCC considered those comments when it promulgated the initial rules in 1999. Truth-In-Billing, 14 FCC Rcd at 7494-97, 7499, 7525, 7557 nn. 4, 7, 10, 13, 21, 144, & App. B. Those comments were not part of the subsequent rulemaking that led to the revision of the rules. Indeed, Vermont PSB had submitted those comments six months before the FCC issued its notice of proposed rulemaking initiating the rulemaking that culminated in the Order.

Vermont PSB did not file a petition for agency reconsideration, as required by section 405(a) as a "condition precedent" for judicial review. Id.

Because Vermont PSB never became a "party" to this proceeding, this Court lacks jurisdiction to entertain the arguments it raises against the validity of the FCC's Order.

II. THE FCC REASONABLY CONSTRUED SECTION 332(c)(3)(A) TO PREEMPT STATES FROM REQUIRING OR PROHIBITING LINE ITEMS ON CMRS BILLS.

Section 332(c)(3)(A) denies states "any authority to regulate . . . the rates charged" by CMRS providers. 47 U.S.C. § 332(c)(3)(A). In enacting this provision, Congress "intended [the] complete preemption" of CMRS rate regulation. Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983 (7th Cir. 2000).[52] The FCC reasonably interpreted the proscription on state rate regulation of CMRS service in section 332(c)(3)(A) to include regulations that require or prohibit the use of line items.

First, when section 332(c)(3)(A) was adopted, a wide variety of permissible methods of regulating telephone rates were in use.[53] Rate regulation was understood to include not only the prescription of dollar amounts charged by

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[52] See Vorhees v. Naper Aero Club, Inc., 272 F.3d 398, 404 (7th Cir. 2001) ("Congress's intent to keep states out of the picture was clear: the relevant statute stated that 'no State or local government shall have *any* authority to impose any rate or entry regulation upon any [CMRS provider].'") (emphasis in original).

[53] See, e.g., FPC v. Louisiana Power & Light Co., 406 U.S. 621, 641 (1972); Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Natural Gas Pipeline Co. of America, 315 U.S. 575, 585 (1942).

utilities, but also the oversight of rate structures[54] and individual rate elements.[55] The FCC's construction of the phrase "regulate . . . the rates" in section 332(c)(3)(A) to include the regulation of rate structures and individual rate elements thus is consistent with the concept of rate regulation as it was understood when Congress enacted section 332(c)(3)(A).

Second, the FCC's interpretation is consistent with administrative and judicial precedent applying the section. The FCC has interpreted the scope of preempted rate regulation in section 332(c)(3)(A) to include "both rate levels and rate structures for CMRS."[56] In Southwestern Bell Mobile Systems, 14 FCC Rcd at 19906 (¶ 20), the FCC held that section 332(c)(3)(A) bars state prohibitions on charges for incoming calls or charging in whole minute increments, explaining that

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[54] E.g., Connecticut DPUC, 78 F.3d at 847 (state commission reviews whether cellular carriers' "rate structures were unreasonable or discriminatory"); Hawaii, 10 FCC Rcd at 7879 (¶ 30) (state commission "monitor[s] rate design and structure" of CMRS carriers); Nationwide Cellular Service, Inc. v. PSC of New York, 180 A.D.2d at 26, 593 N.Y.S.2d at 853 (state commission regulates the "rate structures" of intrastate cellular telephone service).

[55] E.g., MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980); Long-Run Regulation of AT&T's Basic Domestic Interstate Services, 95 FCC 2d 510 (¶ 23) (1983); American Telephone & Telegraph Co., 89 FCC 2d 889, petition for review dism'd, Southern Pacific Communications Co. v. FCC, 682 F.2d 232 (D.C. Cir. 1982). See Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975) ("[W]ithin the power to prescribe charges is the power to determine and prescribe those elements that make up the charge."). The FCC has long held that "[r]ate elements are the basic building blocks of rate structures." American Telephone & Telegraph Co., 84 FCC 2d 158, 182 n.52 (1980). Accord American Telephone & Telegraph Co., 74 FCC 2d 226, 235 (1979).

[56] E.g., WCA, 15 FCC Rcd at 17025 (¶ 8).

"states not only may not prescribe how much may be charged for [CMRS] services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers." See Order, 20 FCC Rcd at 6462-63 (¶ 11). The Eighth Circuit recently cited that interpretation with apparent approval. See Cellco Partnership v. Hatch, No. 04-3198 (8th Cir., Dec. 9, 2005), slip opinion at 3.

Thus, as rate regulation was understood at the time section 332(c)(3)(A) was adopted and as the FCC and the courts have consistently interpreted that statute, a state regulation requiring or prohibiting a specific line item is preempted rate regulation. Such a regulation directly intrudes upon the carrier's ability to set rates and establish rate structures for CMRS service. For example, Vermont PSB regulates rates by prohibiting a CMRS carrier from including a line item in its bill that passes through to its customers the costs it has incurred in paying the Vermont gross revenues tax. Although this prohibition has no impact on Vermont PSB's ability to assess and collect the tax from the CMRS carrier, it plainly and directly limits the discretion of the CMRS carrier to set rates for its own service. Payment of this tax by the CMRS carrier, like the cost of the salary of its sales personnel or the rent for office space, is a cost of providing service in Vermont that the carrier is entitled to recover from the end user in the charges for CMRS service. The inclusion in its rate structure of a line item accurately describing this charge on the

bill of Vermont end-users[57] would enable a nationwide CMRS provider to maintain a nationwide rate structure while recovering the cost of that Vermont tax exclusively from its Vermont customers.

As a practical matter, Vermont's prohibition would require the CMRS provider either to recover the cost of the Vermont tax in its nationwide general service rates (thereby requiring end users in other states to bear the cost of the Vermont tax) or to depart from its nationwide rate structure by establishing a separate, higher aggregate rate for Vermont customers that includes the cost of the Vermont gross revenues tax.[58] Thus, Vermont's prohibition, like other state prohibitions of line items, does more than merely govern the presentation of charges on a CMRS carrier's bill. It involves the State directly in the rate setting process by dictating specific forms of rate structure and proscribing the use of a specific rate element. Order, 20 FCC Rcd at 6464 (¶ 20).

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[57] Vermont PSB argues that a line item to recover the CMRS carrier's costs in paying the Vermont gross revenues tax may "incorrectly suggest that the tax is imposed on the consumer, not the carrier." Vermont Brief, at 57. The federal truth-in-billing rules, however, prohibit CMRS carriers from using unclear or misleading billing descriptions, see Order, 20 FCC Rcd at 6458, 6462 (¶¶ 20, 29), and the FCC emphasized in its Order that states could continue to enforce regulations "that are consistent with [the] federal truth-in-billing rules," including the enforcement of prohibitions on misleading or unclear billing descriptions, 20 FCC Rcd at 6465 (¶ 33). Although Vermont might prefer to prevent the CMRS carriers from including a line item that reminds its customers each month of a state tax that has the effect of increasing their CMRS rates, a line item that accurately reflects the existence of a state tax is not *per se* misleading or deceptive.

[58] A third option would be not to recover the tax from CMRS customers at all. A carrier would not likely elect such an option, and a state could not compel it consistently with section 332(c)(3)(A).

State regulations requiring a CMRS carrier to use a specific line item also regulate rate structures. Such regulations require the carrier to structure its rates in a manner dictated by the state instead of in a way that fits the carrier's own business needs. "By addressing what may or may not be presented as part of a provider's rate," state requirements or prohibitions on line items "directly affect what subscribers see as the provider's rates, which the Act expressly precludes the states from regulating." Id. at 6464 n.90.

The CMRS industry increasingly prices, markets, and provides its services on a nationwide basis.[59] To comply with a multitude of inconsistent line item requirements or prohibitions, CMRS providers might be forced to withdraw nationwide or regional service offerings they would otherwise make available. Alternatively, a CMRS carrier might conclude that the only practicable way to ensure compliance with a particular state requirement would be to apply the same requirement for all of its customers who have chosen a nationwide rate plan. In this way, the state rate regulation might dictate CMRS pricing and service offerings beyond -- as well as within -- the borders of that particular state.

Because one dictionary definition of the term "rate" is a charge or price for a fixed service, the petitioners appear to argue that a line item is not itself a "rate," and thus a state regulation prohibiting or requiring the use of a line item is not rate regulation. The Order interprets the meaning of the statutory phrase "regulate . . . the rates" -- not the term "rates" in isolation. In determining that state regulations

[59] Tenth Report, at ¶ 97.

mandating or prohibiting line items are a form of rate regulation, the FCC did not hold that line items are synonymous with rates. Instead, the FCC's construction reflects the well-established proposition that rate regulation of a particular service includes the regulation of rate structure, rate elements, and rate levels. Order, 20 FCC Rcd at 6463 (¶ 30).

NASUCA acknowledges that rate structures, rate levels, and rate elements "are matters subsumed *within* 'rates.'"[60] NASUCA asserts in its brief that "[t]he terms describe how a CMRS carrier arranges its services and prices, how much it charges per unit of service, and what components go into the calculation of the price the carrier charges for service."[61] A line item clearly is a component of the price a consumer must pay in order to obtain CMRS service. Indeed, NASUCA told the FCC that a CMRS carrier's inclusion of line items in its bill is a component of the carrier's "overall pricing strategy."[62] Thus, under NASUCA's own logic, state requirements or prohibitions of line items are subsumed within the rate regulation that is proscribed by section 332(c)(3)(A).

The petitioners argue that the rate regulation provision of section 332(c)(3)(A) must be construed narrowly in light of section 2(b) of the Act, 47 U.S.C. § 152(b), which generally reserves authority over intrastate telecommunications services to the states. See Vermont PSB Brief at 26-27;

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[60] NASUCA Brief at 23 (emphasis in original).

[61] Id. at 23-24.

[62] NASUCA Petition for Declaratory Ruling at 37.

NASUCA Brief at 34-35. When Congress in 1993 enacted section 332, however, it simultaneously amended section 2(b) to exclude CMRS rate and entry regulation from the scope of matters reserved to state authority under section 2(b). As amended, section 2(b) denies the FCC authority over intrastate communications "[e]xcept as provided in . . . section 332." 47 U.S.C. § 152(b). Petitioners' reliance upon section 2(b) to support a narrow construction of rate regulation under section 332(c)(3)(A) is thus unavailing.

Vermont PSB also argues that the meaning of rate regulation in section 332(c)(3)(A) must be interpreted narrowly in light of the reservation to the states of the power to "regulat[e] the other terms and conditions of commercial mobile services" in the same section. Vermont PSB Brief at 26-27. But the phrase "other terms and conditions" in section 332(c)(3)(A) logically specifies those matters that do not fit within the category of rate or entry regulation. The fact that section 332(c)(3)(A) sets forth two discrete categories (rate and entry regulation on one hand and matters other than rate and entry regulation on the other) does not suggest that Congress intended the rate and entry category to be narrowly circumscribed.

The petitioners argue that the FCC's construction of section 332(c)(3)(A) is inconsistent with a statement in a report of the House Committee on Energy and Commerce that the statutory phrase "other terms and conditions" "includes such matters as customer billing information and practices and billing disputes and other consumer protection matters." Vermont PSB Brief, at 28, *citing* H.R. 103-111, 211 (1993); NASUCA Brief at 27-29, *citing* H.R. 103-111, 211 (1993). But the legislative history nowhere suggests that states may regulate rates in the guise of

regulating billing practices. While "not all regulation relating to a carrier's billing and its relationship with customers represents preempted 'rate regulation,'" Order, 20 FCC Rcd at 6464 (¶ 33), state regulations that require or prohibit line items are a form of rate regulation, even though they affect billing relationships. Indeed, the Supreme Court has recognized that telephone billing restrictions or requirements can constitute rate regulation.[63]

Similarly, the fact that a state requirement or prohibition on line items may be adopted to provide protection for consumers does not establish that the requirement or prohibition is a term or condition "other" than rate regulation. As the Eighth Circuit recently held, the fact that a regulation confers "a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by [section] 332(c)(3)(A)." Cellco Partnership v. Hatch, slip opinion at 9. Indeed, the very purpose of most types of rate regulation is to protect the consumers of the regulated service against unreasonable charges, unjust discrimination, or other types of carrier abuses. "To avoid subsuming the regulation of rates within the governance of 'terms and conditions,' the meaning of 'consumer protection' in this context must exclude regulatory measures . . . that directly impact the rates charged by providers." Id.

[63] American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 514 U.S. 214 (1998) (rejecting the argument that billing matters per se do not involve rates or ratesetting).

Vermont PSB further complains that the FCC in this Order created essentially out of whole cloth a "new national policy of uniformity in billing." Vermont PSB Brief at 40. In fact, the FCC interpreted section 332(c)(3)(A) not to preempt "all regulation relating to a carrier's bills." 20 FCC Rcd at 6466 (¶ 33). The FCC's Declaratory Ruling does not prevent states from adopting regulations governing the disclosure of rates on CMRS bills, from enacting state truth-in-billing rules that are not inconsistent with the FCC's regulations, or from enforcing in a neutral manner state contractual or consumer fraud laws. Id. Nor did the FCC, as Vermont PSB claims, occupy the field with respect to CMRS line items. Vermont PSB Brief at 40. Under the FCC's declaratory ruling, states are free to continue to regulate CMRS line items, in a manner consistent with FCC rules, so long as they do not mandate or prohibit specific line items. Order, 20 FCC Rcd at 6467 (¶ 36).

III. THE FCC DID NOT VIOLATE THE NOTICE AND COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Petitioners and amici contend that in promulgating the Declaratory Ruling, the FCC violated the notice and comment requirements of the APA. Because that argument was not properly raised before the agency, it is not properly before this Court. In any event, the argument lacks merit.

A. Petitioners And Amici Are Barred From Raising The APA Issue Because That Issue Was Not First Presented To The Agency.

It is well settled that a litigant generally cannot raise an issue on judicial review of agency action that was not first presented to the agency.[64] As the Supreme Court stated more than 50 years ago, "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires . . . that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."[65] This Court has held that this general principle of appellate practice bars a litigant on review from arguing that an agency failed to provide a meaningful opportunity for public participation where that procedural argument had not been presented first to the agency itself.[66]

Section 405(a)(2) of the Communications Act codifies this general principle of judicial review of agency action by requiring a party to file a petition for reconsideration with the agency "as a condition precedent to judicial review" of an FCC order where the party relies on "issues of law or fact upon which the Commission . . . has been afforded no opportunity to pass." 47 U.S.C. § 405(a)(2). In this case, no party argued below, in a petition for reconsideration

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[64] United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 69 (1952). See State of Alabama ex rel Siegelman v. EPA, 911 F.2d 499, 505 (11th Cir. 1990); Taft v. Alabama By-Products Corp., 733 F.2d 1518, 1523 (11th Cir. 1984).

[65] L.A. Tucker, 344 U.S. at 69.

[66] Siegelman, 911 F.2d at 505.

or otherwise, that the APA required the FCC to provide notice and comment before declaring that section 332(c)(3)(A) preempted state requirements or prohibitions on line items in CMRS bills, and the FCC did not address the APA issue in its Order.[67] Section 405(a)(2) therefore prohibits the petitioners and supporting amici from raising that argument on judicial review.

The petitioners and amici cannot be excused from complying with section 405(a)(2) on the basis of their alleged lack of notice that the FCC would rule on preemption. Even if a litigant had "no reason" to address a particular issue before the FCC issued its decision, section 405(a)(2) requires a party to raise that issue in a petition for agency reconsideration before it may seek judicial review.[68] The alleged lack of notice does not excuse the subsequent failure of the petitioners and

[67] Commissioner Adelstein in a partial dissent noted as a factual matter that the FCC had not requested comments on the preemption issue. Order, 20 FCC Rcd at 6500. But neither he nor any other Commissioner addressed the legal issue of whether the APA required notice and comment.

[68] AT&T Corp. v. FCC, 86 F.3d 242, 246 (D.C. Cir. 1996). See Time Warner Entertainment Co., L.P. v. FCC, 144 F.3d 75, 80 (D.C. Cir. 1998).

supporting amici to raise the APA issue in a petition for agency reconsideration.[69] Thus, the courts of appeals in a number of cases have applied section 405(a) to bar judicial consideration of the specific argument presented in this case, i.e., that the FCC violated the notice and comment requirements of the APA.[70]

The fact that Verizon Wireless, in an *ex parte* letter, argued before the FCC that the issuance of an interpretative ruling on the preemptive effect of section 332(c)(3)(A) would not violate the notice and comment requirements of the APA does not preserve for judicial review the contrary argument, i.e., that the APA obligated the FCC to provide notice and comment. Where, as here, the litigants argue on review that the FCC made a procedural mistake, such as a "violation of an APA requirement," the courts have construed section 405(a)(2) strictly to require that the "precise claim" be presented first to the agency in order to give the

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[69] In any case, NASUCA's claim that "parties interested in preemption," including consumer advocates, "had no opportunity to address the FCC's preemption decision before it was made," NASUCA Brief at 16, is simply not true. The administrative record contains multiple submissions from NASUCA and others addressing preemption, which were filed before the FCC issued its declaratory ruling. See, e.g., NASUCA Reply Comments at 56-58; Letter from Patrick W. Perlman, Deputy Consumer Advocate, NASUCA, to Marlene Dortch, Secretary, FCC at 2 (Jan. 14, 2005) ("NASUCA Jan. 14, 2005 Letter"); Letter from James Bradford Ramsay, NARUC, to Marlene Dortch, Secretary, FCC (March 3, 2005); Letter from Patrick W. Perlman, Deputy Consumer Advocate, NASUCA, to Marlene Dortch, Secretary, FCC at 2 (Mar. 3, 2005) ("NASUCA Mar. 3, 2005 Letter"); see also, e.g., NARUC Mar. 3, 2005 Letter.

[70] See Cellnet, 149 F.3d at 442; Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1169 (D.C. Cir. 1994); City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1163 (D.C. Cir. 1987); American Radio Relay League v. FCC, 617 F.2d 875, 879 n.8 (D.C. Cir. 1980).

agency the opportunity to correct the alleged procedural error.[71] NASUCA acknowledges that none of its filings before the agency mentions the APA,[72] let alone contains the "precise claim" that the agency violated the APA's notice and comment requirements.[73] Because neither NASUCA nor any other party argued that the procedures the FCC followed in issuing the declaratory ruling violated the APA, the Court should not entertain that challenge on judicial review.

B. In Any Case, The Notice And Comment Procedures Of The APA Do Not Apply To This Declaratory Ruling.

If the Court reaches the issue, it should find that the APA did not require the FCC to conduct a notice and comment rulemaking before issuing its declaratory ruling interpreting the preemptive effect of section 332(c)(3)(A). The notice and

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[71] Time Warner, 144 F.3d at 80.

[72] NASUCA Response in Opposition to the Carriers' Motion to Dismiss (Nov. 14, 2005) at 6 (stating that its filings before the FCC "did not specifically cite the APA").

[73] NASUCA in an *ex parte* submission to the Commission asserted in passing that the preemption of state regulation of line items would be "inappropriate from both a procedural and legal perspective." NASUCA Jan. 14, 2005 Letter, at 2. NASUCA in another *ex parte* letter claimed cryptically that such preemption would be erroneous from a "procedural, legal and policy perspective." NASUCA Mar. 3, 2005 Letter, at 2. The FCC has no obligation "to identify arguments that are not stated with clarity by a petitioner." Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279-80 (D.C. Cir. 1997) (internal quotations omitted). See AT&T Corp. v. FCC, 317 F.3d 227, 235 (D.C. Cir. 2003). NASUCA's allusions to an unspecified "procedural" issue in *ex parte* letters filed in the administrative proceeding are "too vague" to preserve any issue for judicial review, let alone the specific APA argument it presents to the Court. New Jersey Telephone Corp. v. FCC, 393 F.3d 219, 222 (D.C. Cir. 2004).

comment procedures of the APA apply only where the agency promulgates, amends, or repeals a substantive rule. 5 U.S.C. § 553. The FCC in issuing its preemption ruling did not adopt, modify, or revoke any rule. Instead, this declaratory ruling was an adjudication for which the notice and comment rulemaking procedures are not required. And even if it could be characterized as rulemaking, the declaratory ruling at most was an interpretative rule that is exempt from notice and comment requirements. 5 U.S.C. § 553(b)(3)(A).

1. The Preemption Ruling Was An Adjudication.

The FCC's preemption ruling was an exercise of its adjudicative authority under section 5(d) of the APA "to issue a declaratory order to terminate a controversy or remove an uncertainty." 5 U.S.C. § 554(e).[74] Before the FCC issued its ruling there had been substantial uncertainty as to whether state requirements or prohibitions on the use of line items were a form of rate regulation proscribed by section 332(c)(3)(A). Section 332(c)(3)(A) does not define rate regulation, and the parties in the administrative proceeding below were sharply divided over this issue. The FCC's adjudicative ruling had the purpose and effect of clarifying a previously unsettled matter concerning the preemptive scope of section 332(c)(3)(A).

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[74] Section 5(d) is contained in the part of the APA titled "Adjudications." See Radiofone, Inc. v. FCC, 759 F.2d 936, 939 (D.C. Cir. 1985) (Section 5(d) "pertains to adjudication"); Loveday v. FCC, 707 F.2d 1443, 1447 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983) (FCC orders issued pursuant to section 5(d) are "adjudicatory rulings").

It is "well-established" that "agencies have discretion to choose whether to proceed by rulemaking or adjudication." RTC Transportation v. ICC, 731 F.2d 1502, 1505 (11th Cir. 1984).[75] As this Court has recognized, an agency may exercise its adjudicative authority, as the FCC did here,[76] in interpreting a provision of its governing statute. Id. See also Chisholm v. FCC, 538 F.2d 349, 364-66 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). The FCC has utilized its adjudicatory authority to issue declaratory rulings in preemption cases.[77]

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[75] See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). See also 47 U.S.C. § 154(j) (FCC has discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

[76] The FCC in issuing the declaratory ruling did not purport to engage in rulemaking. The FCC did not initiate the proceeding by issuing a notice of proposed rulemaking or conclude it by adopting, amending, or revoking any preemption rule. The FCC, in response to comments submitted in an adjudicatory proceeding, "clarif[ied]" that state regulations requiring or prohibiting the use of line items for CMRS are preempted under section 332(c)(3)(A). Order, 20 FCC Rcd at 6449 (¶ 2). And the FCC issued that clarification in a section of the Order entitled "Declaratory Ruling," which was separate from the rulemaking sections of the Order.

[77] New York State Commission on Cable Television v. FCC, 749 F.2d 804, 814 (D.C. Cir. 1984) (FCC's declaratory ruling preempting state and local entry of satellite master antenna television is an "adjudication"); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 791 n.2 (4th Cir. 1976) (characterizing the FCC declaratory ruling that state regulatory agencies are precluded from restricting or regulating the interconnection of customer-provided equipment as an exercise of its authority under section 5(d)).

Adjudicatory orders "may establish broad legal principles"[78] and have "general prospective application."[79] The fact that the FCC "might have promulgated a . . . rule"[80] implementing the preemptive scope of section 332(c)(3)(A) does not transform the FCC's adjudicatory declaratory ruling into a rulemaking.

2. If Not An Adjudication, The Declaratory Ruling Adopted An Interpretative Rule Exempt From The Notice And Comment Requirements.

Even if the declaratory ruling were deemed to be the result of rulemaking rather than an adjudication, the ruling would be an "interpretative rule" that is not subject to the notice and comment requirements of the APA. 5 U.S.C. § 553(b)(3)(A). See Lincoln v. Vigil, 508 U.S. 182, 195 (1993).[81] An interpretative rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[82] In contrast to a legislative rule, in which the agency creates new rights or obligations, an interpretative rule provides "the agency's opinion as to what the governing statute

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[78] Central Texas Telephone Cooperative, Inc. v. FCC, 402 F.3d 205, 210 (D.C. Cir. 2005).

[79] New York State Commission, 749 F.2d at 815.

[80] Chenery, 332 U.S. at 201.

[81] See also United States v. Palzer, 745 F.2d 1350, 1357 n.15 (11th Cir. 1984).

[82] Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995) (internal quotes omitted). See Brown Express, Inc. v. United States, 607 F.2d 695, 700 (5th Cir. 1969).

means."[83] When an agency issues an interpretative rule, the statute that the agency interprets "remains the source of the law."[84]

The "starting point" in determining whether a rule is interpretative or legislative is the agency's characterization of its action.[85] The courts "listen carefully to the statements of the agency in its decision and will honor its characterization if it reasonably describes what the agency in fact has done."[86]

In this case, the FCC in its declaratory ruling characterized its action as "clarify[ing]" that certain types of state regulations "are preempted under section 332(c)(3)(A)." Order, 20 FCC Rcd at 6448, 6462 (¶¶ 1, 30). The FCC in its declaratory ruling did not itself preempt any state regulation.[87] Instead, it interpreted the preemptive scope of a federal statute that had been in effect for over

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[83] American Trucking Association, Inc. v. United States, 688 F.2d 1337, 1342 (11th Cir. 1982), rev'd on other grounds, 467 U.S. 354 (1984). See Dismas Charities, Inc. v. United States Department of Justice, 401 F.3d 666, 679 (6th Cir. 2005).

[84] Metropolitan School District of Wayne Township v. Davila, 969 F.2d 485, 489 (7th Cir. 1992).

[85] Id. at 490.

[86] American Trucking, 688 F.2d at 1341.

[87] NASUCA is wrong in claiming that the FCC's preemption ruling effected a substantive change in prior law by invalidating certain types of state regulations. See NASUCA Brief at 58. The FCC's declaratory ruling merely interpreted the meaning of an existing federal statute. The federal preemption of state regulations requiring or forbidding line items in CMRS bills results from Congress's decision in 1993 to enact section 332(c)(3)(A), not from the FCC's decision in 2005 interpreting that statute.

a decade.[88] Because the FCC "constru[ed] the product of congressional lawmaking" without exercising its delegated authority to "make positive law," its preemption ruling is not legislative rulemaking.[89]

NASUCA argues that the FCC's initiation of further rulemaking in its Order to consider inter alia whether the FCC should preempt certain billing practices of CMRS and wireline carriers "confirm[s]" that its preemption ruling is a legislative rule that required notice and comment. NASUCA Brief at 59. See Order, 20 FCC Rcd at 6473-76 (¶¶ 49-53). The further rulemaking goes beyond interpretation of existing law, however, and proposes, inter alia, conflict preemption of state regulation. In any event, the FCC has broad discretion to choose procedures for its administrative proceedings[90] and is free to confer "procedural rights" in particular cases that are in "addition[]" to those mandated by the APA.[91] The FCC

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[88] Vermont PSB's assertion that "this case involves administrative preemption, not statutory preemption," is simply wrong. See Vermont PSB Brief at 19. The FCC interpreted the preemptive effect of section 332(c)(3)(A); it did not determine the types of state regulations that ought to be preempted as a policy matter.

[89] Syncor International Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997).

[90] See 47 U.S.C. § 154(j); FCC v. Schreiber, 381 U.S. 279, 290 (1965).

[91] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 523 (1978).

use of notice and comment procedures in its further inquiry does not demonstrate that the APA requires such procedures.[92]

IV. THE PETITIONERS' CHALLENGE TO THE FCC'S OBSERVATION CONCERNING CONFLICT PREEMPTION IS NOT REVIEWABLE AND IS IN ANY EVENT WITHOUT MERIT.

Apart from its ruling on the preemptive effect of section 332(c)(3), the FCC in its Order "note[d]" in a single paragraph that state regulations requiring or prohibiting the use of line items "may be subject to preemption because they conflict with established federal policies." Order, 20 FCC Rcd at 6466-67 (¶ 35) (emphasis added).[93] As Vermont PSB acknowledges, the FCC's tentative language "suggests that the FCC has not actually ruled on conflict preemption." Vermont

[92] NASUCA also claims that the FCC violated the APA notice and comment requirements in its separate decision to amend section 64.2401(b) to eliminate the exemption for CMRS carriers to the requirement that billing descriptions be brief, clear, non-misleading, and in plain language. NASUCA Brief at 55 n.34. NASUCA is not seeking review of that rule amendment, id., and thus it lacks standing to challenge the procedures the agency used in making it. See, e.g., Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 810 (11th Cir. 1993), cert. denied, 510 U.S. 1040 (1994). As a factual matter NASUCA is wrong in claiming that the FCC adopted this rule change without notice and comment. The FCC provided explicit notice that it was considering this rule amendment and invited parties to comment upon the proposed change. See Truth-In-Billing, 14 FCC Rcd at 7535 (¶ 68).

[93] The FCC is considering issues relating to conflict preemption in its pending rulemaking. Order, 20 FCC Rcd at 6474 (¶ 50).

PSB Brief at 20.[94] Nonetheless an entire section of Vermont PSB's brief responds to the FCC's supposed "assert[ion] that any State regulation of wireless line items would conflict with established federal policies." Vermont PSB Brief at 39 (emphasis added).[95] NASUCA also presents an extensive argument against the FCC's alleged conflict preemption. NASUCA Brief at 16, 43-54. The petitioners' arguments are not properly before the Court.[96]

In limiting the appellate courts' jurisdiction over Commission "orders," 28 U.S.C. § 2342(1), Congress did not permit the courts to "scrutinize administrators'

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[94] NASUCA also acknowledges that the FCC only "suggest[ed]" that state regulations mandating or prohibiting line items would conflict with federal policy. NASUCA Brief at 52.

[95] Vermont PSB states that it "assumes for the purposes of this brief that the FCC has ruled on conflict preemption" because the FCC's statement that state regulation "may be" in conflict with established federal policies is contained in the "Declaratory Order" section of the Order. Vermont Brief at 10 n.11. Vermont provides no explanation as to why the location within an order of a tentative statement as to what "may be" transforms the statement into a definitive ruling that is subject to judicial review.

[96] The FCC did not err in stating that section 332 and the FCC's implementation of that statute and other parts of the Act establish a "federal policy of a uniform, national and deregulatory framework" to govern CMRS rates. Order, 20 FCC Rcd at 6467 (¶ 35). By preempting the states' authority to regulate CMRS rates unless they first seek and obtain approval from the FCC, Congress in section 332(c)(3)(A) replaced the dual federal and state regulatory regime as to rates with a uniform, national framework that is administered by the FCC. And that framework clearly is deregulatory. Congress in section 332(c)(1)(A) authorized the FCC to reduce regulation on CMRS carriers (47 U.S.C. § 332(c)(1)(A)), and the FCC has exercised that authority by detariffing CMRS. 47 C.F.R. § 20.15(c); Second Report, 9 FCC Rcd at 1480 (¶ 9). See Michael Linet, Inc. v. Village of Wellington, Florida, 408 F.3d 757, 761 (11th Cir. 2005) (section 332 "deregulated various aspects of the wireless phone industry").

passing remarks, . . . and stalk their every step along alternative paths of reasoning." American Telephone & Telegraph Co. v. FCC, 602 F.2d 401, 409 (D.C. Cir. 1979). While it may be "appropriate" for the FCC to write its opinions broadly, every statement in an FCC decision is not reviewable: "federal courts have never been empowered to issue advisory opinions." FCC v. Pacifica Foundation, 438 U.S. 726, 735 (1978). The function of the judiciary is to review "judgments, not statements in opinions."[97] This is particularly true of statements an agency may make as to possible alternative rationales that it has not yet conclusively evaluated. The Court thus is not empowered to review the FCC's mere observation that state regulations requiring or proscribing line items may conflict with established federal policy.

In any event, the FCC's tentative observation is consistent with the deregulatory, pro-competitive policy underlying the Act. Pursuant to that policy, "the CMRS-customer relationship is not governed by terms set out by carriers in regulatory tariff filings, but by the mechanisms of a competitive marketplace."[98] With the statutory prohibition on state rate regulation and the federal detariffing of CMRS service, CMRS rates, rate elements, and rate structures are not subject to governmental regulation on a prospective basis. Instead, federal policy gives CMRS carriers "the freedom to respond to consumer and market forces" by letting the carriers themselves determine whether to charge a single rate or to "list the

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[97] E.g., Chevron, 467 U.S. at 842; Pacifica, 438 U.S. at 734-35.

[98] WCA, 15 FCC Rcd at 17032 (¶ 20). See Order, 20 FCC Rcd at 6466 (¶ 35).

charges in separate line items."[99] Indeed, six years ago the FCC decided as a matter of policy not to compel carriers either "to combine all regulatory fees into one charge, or [to] separate[e] out any fees resulting from regulatory action." Truth-In-Billing, 14 FCC Rcd at 17090 (¶¶ 55-56). The FCC, in explaining its hands-off approach, stated that "it is the carriers' business decision whether, how, and how much of [their] costs they choose to recover directly from consumers through separately identifiable charges." Id.

State rate regulations compelling or prohibiting the use of specific line items for CMRS service may well conflict with this deregulatory federal policy. By dictating a particular type of rate structure, such state regulations deny carriers some of the flexibility they have under federal law to formulate their own rate structures in the first instance and to decide what costs, if any, they will recover through separately identifiable charges.

V. THE PETITIONERS' CLAIMS THAT THE ORDER CONFLICTS WITH THE STATUTORY SAVINGS CLAUSES ARE NOT REVIEWABLE AND IN ANY EVENT LACK MERIT.

The petitioners' contentions that the preemption ruling conflicts with section 414 of the Communications Act[100] and section 601(c)(1) of the

[99] Truth-In-Billing, 14 FCC Rcd at 17090 (¶ 55).

[100] 47 U.S.C. § 414.

Telecommunications Act of 1996[101] are not properly before the Court. See 47 U.S.C. § 405; L.A. Tucker, 344 U.S. at 69. None of the parties argued below that the preemption ruling conflicts with section 414 or section 601(c)(1), and the FCC on its own initiative did not consider those statutory issues.

In any event, the preemption ruling does not conflict with either section 414 or section 601(c)(1). Section 414 states that "[n]othing in the [Communications Act] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of [the Act] are in addition to such remedies." 47 U.S.C. § 414. The Supreme Court and the courts of appeals have construed this statute "narrowly"[102] to preserve only those state remedies that are not "inconsistent with the provisions of the [Communications] [A]ct."[103] As we have shown above, the FCC determined that state regulation that mandates or prohibits line items is a form of rate regulation that is explicitly denied to the states under section 332(c)(3)(A). To read section 414 to preserve this type of state rate

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[101] Telecommunications Act of 1996, Pub. L. No. 104-104,110 Stat. 56, § 601(c)(1).

[102] Bastien, 205 F.2d at 987.

[103] AT&T, 524 U.S. at 227, quoting Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

regulation "would abrogate the very federal regulation of mobile telephone providers that the [A]ct intended to create."[104]

The FCC's preemption ruling also is not inconsistent with the savings clause in section 601(c)(1) of the Telecommunications Act of 1996, which provides that the "Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, 110 Stat. 56 (1996). The Seventh Circuit has held that section 601(c)(1) "by its own terms applies only to 'this Act and the amendments made by this Act,'" a phrase that refers to "the Telecommunications Act of 1996, and not the Communications Act of 1934." Boomer v. AT&T Corp., 309 F.3d 404, 423 (7th Cir. 2002). Section 332 was enacted as an amendment to the 1934 Communications Act by the 1993 OBRA amendments, and thus is not a part of the Telecommunications Act of 1996.

In any event, section 601(c)(1) -- like section 414 -- cannot be read to preserve state or local laws that conflict with section 332(c)(3)(A). Indeed, section 601(c)(1) recognizes that state laws can be "modif[ied], impair[ed], or supersede[d]" where "expressly so provided" by federal statute.[105]

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[104] Bastien, 205 F.2d at 987.

[105] Pub. L. No. 104-104, 110 Stat. 56 (1996), § 601(c)(1).

VI. THE PREEMPTION DECISION DOES NOT INTERFERE WITH STATE TAXING AUTHORITY.

Contrary to Vermont PSB's contention, the FCC's preemption decision does not "substantially affect[] . . . the ability of the [s]tates to collect their [tax] revenues." Vermont PSB Brief at 61. The states remain free to decide what state taxes to levy and who is subject to those taxes, and to collect them from those the state decides should pay them. Thus, assuming section 601(c)(2) of the Telecommunications Act applies to the FCC's interpretation of section 332(c)(3)(A),[106] Vermont is wrong in contending that section 332(C)(3)(A) "modif[ies], impair[s], or supersede[s]" state tax law in violation of that provision. Pub. L. No. 104-104, 110 Stat. 56, § 601(c)(1) (1996). Even if section 601(c)(2) were relevant here, the FCC's decision is fully "consistent with section 601(c)(2)." Order, 20 FCC Rcd at 6464 (¶ 32).

The FCC's determination that section 332(c)(3)(A) preempts states from requiring or prohibiting line items on CMRS bills does not speak to the power of the states to assess taxes or to the obligation of CMRS carriers or their customers to pay them. The Order concerns the regulation of rates, not the assessment or collection of taxes. Thus, there is no inconsistency between the FCC's interpretation of section 332(c)(3)(A) to bar state regulations that require or

[106] Vermont PSB characterizes section 601(c)(2) as prohibiting the FCC from construing "provisions of the Telecommunications Act of 1996" in a way that modifies, impairs, or supersedes state tax laws. Vermont PSB Brief at 62. As noted, section 332(c)(3)(A) was enacted in 1993, three years prior to the adoption of the 1996 Telecommunications Act.

prohibit line items and its claim that the Order does not impair state assessment or collection of taxes.

Vermont PSB argues claims that the preemption decision violates the Tax Injunction Act ("TIA") and the general principles of comity and federalism that underlie that statute. 28 U.S.C. § 1341. Those arguments are not properly before the Court because Vermont PSB did not raise them before the FCC. See 47 U.S.C § 405; Seigelman, 911 F.2d at 505.

In any event, Vermont PSB's arguments misread the TIA and misapprehend its underlying principles of comity and federalism. The TIA prohibits the federal district courts from enjoining the "assessment, levy, or collection" of any state tax where there is "a plain, speedy and efficient remedy" in the state courts. 28 U.S.C. § 1341. The TIA thus divests a federal district court of subject-matter jurisdiction over certain cases involving state tax; it does not dictate how a federal court of appeals exercising its jurisdiction to review an agency decision should interpret a federal statute that preempts state law.

The Supreme Court just last year made clear in Hibbs v. Winn that the TIA applies only to "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." 542 U.S. 88, 107 (2004). The Court rejected the argument made by Vermont PSB here -- that the TIA reflects a broad policy of federal noninterference with every facet of state tax administration. 452 U.S. at 104-105. The Supreme Court explained that Congress in enacting the TIA focused narrowly on "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority." 542 U.S. at

104. And the Court made clear that the "principles of comity" underlying the TIA apply "only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." Id. at 107 n.9.[107]

No party here seeks to invoke district court jurisdiction to challenge a state tax assessment in lieu of a "pay-then-protest" procedure available under state law. Instead, the petitioners themselves seek to invoke the jurisdiction of a federal appellate court to review a federal agency's construction of a federal statute. The resolution of that exclusively federal issue in a federal court of appeals does not implicate the principles of comity and federalism that underlie the TIA. It requires the Court to determine only whether the FCC reasonably construed section 332(c)(3)(A).

Vermont PSB argues that the FCC erred by disregarding the alleged effect of its preemption decision on the administration of three specific Vermont state assessments or taxes: the Vermont Universal Service Fund ("VUSF"), the Vermont gross revenues tax, and the Vermont sales tax. Vermont PSB Brief at 50-57. None of Vermont PSB's specific allegations, however, supports its claim that the Order impedes the administration of state taxes or shows that the Order is arbitrary and capricious.

[107] The Supreme Court recognized that, in describing the policy underlying the TIA broadly, it previously had "referred to the disruption of 'state tax administration," but clarified that the description was offered "specifically in relation to 'the collection of revenue.'" Hibbs v. Winn, 542 U.S. at 106.

Universal Service Fund. Vermont PSB acknowledges that it "never adopted a formal rule" requiring or prohibiting the VUSF as a line item in CMRS bills. Vermont PSB Brief at 54. Since the FCC's preemption ruling is limited to state regulations that compel or bar the use of line items on CMRS bills,[108] that ruling -- by Vermont PSB's own admission -- has no effect at all on Vermont's administration of the VUSF. And Vermont PSB is wrong in claiming that the Order "would prevent [it] from taking any direct enforcement action should a carrier misrepresent the rate or mischaracterize the [VUSF] charge." Vermont PSB Brief at 54. States remain free to enact and enforce requirements that are consistent with the FCC's truth-in-billing rules, including requirements that bills be truthful and non-misleading. Order, 20 FCC Rcd at 6465 n.94.

Gross Revenue Tax. The Vermont gross revenues tax "is imposed on utilities and not customers,"[109] and the Order has no effect on Vermont PSB's ability to assess or collect that tax. The FCC's decision affects only the ability of Vermont PSB to prevent a CMRS carrier, after it has paid the tax, from passing through that tax to its own customers as a line item on its bill. Vermont PSB's prohibition on the CMRS carriers' pass-through of that tax is not an exercise of its taxing power. See Mobil Oil Corp. v. Tully, 639 F.2d 912, 918 (2d Cir. 1981) ("[I]n barring the targets of the tax from recovering their costs from the consumer directly or indirectly the State has gone beyond its taxing powers and has employed its police powers.").

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[108] See Order, 20 FCC Rcd at 6464 (¶ 32).

[109] Vermont PSB Brief at 55.

Sales Tax. Although Vermont PSB complains about the effect of the Order upon the administration of its sales tax,[110] it admits uncertainty as to whether the Order even applies to that tax. Vermont PSB states, for example, that, "Vermont may no longer be able to require carriers to itemize sales taxes," and that CMRS carriers "might" be able to avoid listing that tax separately on its customers' bills. Vermont PSB Brief at 52, 53. Vermont PSB also alleges that the Order "could deprive exempt customers" of the means to verify that they have not paid the sales tax. Vermont PSB Brief at 53 (emphasis added).

Despite its apparent uncertainty, Vermont PSB did not seek clarification from the FCC as to whether the Order precludes Vermont from requiring CMRS carriers to list the Vermont sales tax on their bills.[111] As a result, the FCC has not had an opportunity to clarify whether it interprets section 332(c)(3)(A) to prevent Vermont from requiring CMRS carriers to list the sales tax separately on their bills. In the absence of such clarification, Vermont PSB's speculative musings that the Order might affect its administration of the sales tax are not properly before the Court.

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[110] Vermont did not file a petition for reconsideration with the Commission presenting any argument concerning the Vermont sales tax and thus is barred from presenting arguments concerning that tax on review. See 47 U.S.C. § 405.

[111] Vermont PSB could have filed a petition for reconsideration or clarification of the Order after it was issued raising its concerns regarding the Vermont sales tax. Indeed, Vermont PSB is free even now to ask the FCC for clarification in a petition for declaratory ruling. See 47 C.F.R. § 1.2.

CONCLUSION

The Court should dismiss Vermont PSB's petition for review for lack of subject-matter jurisdiction. The Court should deny NASUCA's petition for review.

Respectfully submitted,

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January 12, 2006

IN THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, et al., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NOS. 05-11682-DD AND 05-12601-DD

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13990 words.

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January 12, 2006

STATUTORY APPENDIX

5 U.S.C. § 553
5 U.S.C. § 554

28 U.S.C. § 2344

47 U.S.C. § 154(j)
47 U.S.C. § 332
47 U.S.C. § 405

5 U.S.C.A. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral

presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

When rules are required by statute to be made on the record after opportunity for an agency hearing, secons 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C.A. § 554

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
(2) the selection or tenure of an employee, except a [FN1] administrative law judge appointed under secontion 3105 of this title;
(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;
(5) cases in which an agency is acting as an agent for a court; or
(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;
(2) the legal authority and jurisdiction under which the hearing is to be held; and
(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 and of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;
(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C.A. § 154

§ 154. Federal Communications Commission

* * * * *

(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

* * * * *

47 U.S.C.A. § 332

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202 or 208,

of this title, and may specify any other provision only if the Commission determines that --

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
(ii) enforcement of such provision is not necessary for the protection of consumers; and
(iii) specifying such provision is consistent with the public interest.
(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.
(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or
not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.
(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the

licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion
of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--
(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or
unreasonably discriminatory.
(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State

may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:
(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.
(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and
(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to
such services.

(d) Definitions

For purposes of this section--

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;
(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and
(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C.A. § 405

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the
order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of
evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be

filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

National Association of State Utility Consumer Advocates, Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Respondents" was served this 12th day of January, 2006, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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